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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK MENDEZ BAXTER,

Defendant and Appellant.

B232852

(Los Angeles County
Super. Ct. No. BA351739)

APPEAL from an order of the Superior Court of Los Angeles County, Kathryn A. Solorzano, Judge. Reversed with directions.

David W. Scopp, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Lawrence M. Daniels and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Patrick Mendez Baxter appeals from an order revoking and terminating his probation for possession of marijuana. When defendant was placed on probation, the trial court imposed a probation condition that defendant “not use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription.” Defendant contends that the trial court’s revocation of probation was erroneous based on his possession of medical marijuana. We find merit to defendant’s contention.

FACTUAL AND PROCEDURAL BACKGROUND

In an information filed on February 17, 2009, the Los Angeles County District Attorney charged defendant with selling or transporting marijuana (Health & Saf. Code, § 11360, subd. (a)), and with four prior prison term enhancements pursuant to Penal Code section 667.5, subdivision (b), and an enhancement pursuant to Health and Safety Code section 11370.2, subdivision (a). On August 12, 2009, pursuant to a negotiated plea, defendant pled guilty to selling or transporting marijuana and admitted that he had served two prior prison terms. The court suspended imposition of the sentence and placed defendant on formal probation for a period of three years with various terms and conditions. The other allegations were dismissed pursuant to Penal Code section 1385.

On August 6, 2010, the court found defendant in violation of probation and revoked and reinstated probation.

On January 19, 2011, defendant was arrested while in possession of two bags of marijuana, “packag[ing] material” consisting of Ziploc bags, a vial containing what appeared to be trace amounts of marijuana, a “plastic package” containing marijuana, a hand-rolled marijuana cigarette, and \$85 in cash.

At the probation violation hearing, defendant attempted to raise a medical-marijuana defense, contending he was authorized by a valid physician’s recommendation

to possess and use marijuana for medical purposes. The court pointed out that defendant could have sought modification of his probation to permit him to use medical marijuana (Health & Saf. Code, § 11362.795, subd. (a)¹), but he did not do so. Therefore, at that point, the court was “not required to evaluate whether or not the marijuana that [defendant] possessed on that day was possessed for sale or personal use. It’s . . . beyond that now, because the reality is that [defendant] violated the terms of [his] probation.”

The court found defendant was in violation of his probation. It imposed a midterm sentence of three years and stayed the two one-year prior conviction enhancements.

DISCUSSION

A. *Standard of Review*

Penal Code section 1203.2, subdivision (a), authorizes a court to revoke and terminate “probation if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses.” A court is not required “to determine whether the probationer is guilty or innocent of a crime, but [rather] whether a violation of the terms of probation has occurred and, if so, whether it would be appropriate to allow the probationer to continue to retain his [or her] conditional liberty.” (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 348.) The facts

¹ Health and Safety Code section 11362.5 exempts from prosecution those who possess or cultivate marijuana “for the personal medical purposes of [a] patient upon the written or oral recommendation or approval of a physician.” (*Id.*, subd. (d).) Health and Safety Code section 11362.795, subdivision (a)(1), provides: “Any criminal defendant who is eligible to use marijuana pursuant to Section 11362.5 may request that the court confirm that he or she is allowed to use medical marijuana while he or she is on probation or released on bail.”

supporting revocation need only be proved by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441.) When the evidence is conflicting, the preponderance of the evidence standard is met if the fact finder determines which evidence is credible and the factual finding made based on that evidence is supported by substantial evidence. (*People v. Lopez* (1997) 52 Cal.App.4th 233, 250.)

The trial court has broad discretion in determining whether the probationer has violated the conditions of his or her probation. (*People v. Rodriguez, supra*, 51 Cal.3d at p. 443.) Probation revocation decisions are reviewed under an abuse of discretion standard. (*Ibid.*) A trial court's exercise of discretion "will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice [citations]. In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Michael W.* (1995) 32 Cal.App.4th 1111, 1120.) There is no abuse of discretion if the evidence shows the probationer violated the terms and conditions of his or her probation. (*People v. Hawkins* (1975) 44 Cal.App.3d 958, 968.)

B. Revocation of Probation Despite Medical-Marijuana Defense

Defendant contends that the trial court incorrectly concluded that his conditions of probation prohibited medical marijuana. We agree.

Defendant correctly states that he was ordered not to possess narcotics, "except with a valid prescription." The reporter's transcript of defendant's plea and sentencing is very clear. The trial court told defendant at the time he was placed on probation for a marijuana violation, the following: "You can't use any drugs. You can't possess any drugs. You can't possess any drug paraphernalia unless you go into an authorized drug education treatment program." The minute order states that defendant was ordered not to "use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription."

Defendant relies primarily on *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433 to support his position that the trial court erred in not allowing him to raise his medical

marijuana defense. In *Tilehkooh*, the trial court “revoked [the] defendant’s probation,” based on the conclusion that the noncriminal possession of marijuana was a “violation of the condition that he not ‘possess/consume controlled substances’” unless prescribed by a physician. (*Id.* at p. 1440.) The Third District Court of Appeal reversed, holding that Health and Safety Code section 11362.5 provides “a defense to the criminal sanction of revocation of . . . probation where, as here, there is no claim that [the defendant’s] conduct endangered others or that [the defendant] diverted marijuana for nonmedical purposes.” (*Id.* at p. 1437.) In the instant case, the trial court did not rule that defendant’s proffered medical marijuana defense was excludable as a matter of law. It held, in effect, that the defense was not relevant since defendant’s terms of probation themselves prohibited marijuana use even for medical purposes.

Defendant is correct, and the People concede, that the trial court initially was incorrect in stating that the *Tilehkooh* decision had been superseded by *People v. Moret* (2009) 180 Cal.App.4th 839, 856), believing that *Moret* was a California Supreme Court decision. In *Moret*, the court stated that the only reasonable interpretation of Health and Safety Code section 11362.795 (section 11362.795), subdivision (a)(1), is that a trial court has “discretion to impose a no-marijuana-use probation condition on the holder of a medical marijuana card.” (*Id.* at p. 853). The *Moret* court stated that section 11362.795, which was enacted after the *Tilehkooh* decision, clearly contemplated the possibility of a no-medical-marijuana probation condition and *Tilehkooh* therefore was of “questionable validity” for the proposition that a court could not impose such a condition. (*Moret*, *supra*, at p. 853, fn. 12.)

People v. Hughes (2012) 202 Cal.App.4th 1473 at page 1480 also held that “the only reasonable interpretation of section 11362.795 . . . is that it authorizes a trial court to impose a condition of probation that prohibits a defendant from using medical marijuana.” The court stated that “[t]he probation term prohibiting defendant from possessing marijuana even for medical use has a relationship to the crimes of which defendant was convicted, namely cultivating marijuana, possessing marijuana for sale, and transporting marijuana . . . even though possession of marijuana for medical use is

not conduct that is unlawful, the trial court nevertheless could prohibit such possession as a condition of defendant's probation. [Citation.]" (*Hughes, supra*, at p. 1481.)

Here, the trial court's oral statement as to the "no-drugs" condition of defendant's probation was merely a general statement, as it did not specify the drugs to which it applied. The minute order specified that defendant could not "use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription." Although under *Moret* and *Hughes* the court could have imposed a no medical-marijuana condition, the minute order is silent as to whether defendant could possess marijuana for medical purposes with a valid medical marijuana card or prescription. This ambiguity in the probation condition must be resolved in favor of defendant (*People v. Hoeninghaus* (2004) 120 Cal.App.4th 1180, 1196), to permit him to raise a *Tilehkooh* defense. It follows that defendant should be given a new probation revocation hearing at which he would have the opportunity to prove he had a valid medical marijuana authorization and that he possessed the marijuana for medical purposes only.

C. Request for Modification of Probation Conditions

Defendant contends that, even if his original probation conditions did not permit the use of medical marijuana, the trial court abused its discretion by refusing his request to modify the "no-drugs" probation condition at the probation violation hearing. We agree.

The court certainly has authority "at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence." (Pen. Code, § 1203.3, subd. (a).) In addition, even where a defendant violates probation, the court has discretion to modify probation terms without imposing a prison term. (*People v. Hawthorne* (1991) 226 Cal.App.3d 789, 795.) It is also correct that section 11362.795 expressly authorizes a probationer to "request a modification of the conditions of probation . . . to authorize the use of medical marijuana," if, during the

probation period, “a physician recommends that the probationer or defendant use medical marijuana.” (§ 11362.795, subd. (a)(3).)

Section 11362.795, subdivision (a)(3), states: “During the period of probation or release on bail, if a physician recommends that the probationer or defendant use medical marijuana, the probationer or defendant may request a modification of the conditions of probation or bail to authorize the use of medical marijuana.” The statute does not specify a time limitation for making the request. In light of the ambiguity in the “no-drugs” probation condition, we conclude that defendant’s request for modification of the condition was timely. Therefore, the trial court erred in refusing to consider it.

DISPOSITION

The order is reversed. The trial court is directed to conduct a new probation revocation hearing consistent with the views expressed herein.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.